IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CHARLES NELSON CO.,
Appellant,

vs.

THE STANDARD THEATRE CO.,
Appellee.

No. 1367.

Supplemental Brief of Appellee

Wm. H. BRINKER,
Proctor for Libelant and Appellee

SEATTLE, WASH.

YERKES PRINTING CO. TIMES BUILDING SEATTLE

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Supplemental Brief of Appellee

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit.

The appellee respectfully prays the Court for leave to file a supplemental brief herein, in answer to the brief filed by appellant, and shows to the Court:

That this cause was originally set for hearing on Oct. 11th, 1906, afterwards at appellant's request continued to February 4th, 1907, and again at appellant's request passed to the foot of the calendar of the February term and set for March 13th, 1907, with the understanding that appellant's brief should be served thirty days before the hearing.

That on February 27th, 1907, appellant having failed to serve its brief, appellee's proctor wrote the proctor for appellant that appellee would put its brief in the hands of the printers on March 1st, 1907, which was done, and March 5th, appellee served its brief upon appellant by registered mail and sent twenty copies by express to the Clerk of this Court. On March 6th, 1907, appellant served its brief on appellee by mail.

Appellee states that the brief of appellant not having been filed within the time stipulated, nor within the time prescribed by the rules of this Court, appellee feared that appellant might not file its brief at all, and, being desirous of having the cause determined anew by this Court, prepared, printed and filed its brief, long after appellant's brief was due. Appellant's brief having been served on appellee after appellee's brief had been forwarded to the Clerk of this Court and appellee not having therefore, an opportunity to answer the same in its original brief, will not ask to strike the brief of appellant, as it might do, but asks leave to answer it, as well as it may in the very limited time left to it, in this supplemental brief.

Assuming that the leave prayed for will be granted, appellee will endeavor to answer appellant's argument.

I.

Appellant first contends that because the right to general average was a part of the Bill of Lading, which provided that general average should be adjusted according to the York-Antwerp Rules of 1890, the other clauses of the Bill of Lading which it copies on pages 6 and 7 of its brief, should in effect, nullify the provis-

ion for general average, but we insist that this position is not only unsound, but illogical, for if the clause providing that general average must be according to the York-Antwerp Rules, is to be held a part of the contract of carriage, then it is in conflict with the other clauses which appellant quotes, and it being the contract furnished by the ship, any ambiguity or conflict in it should be resolved in favor of the appellee.

Garrison vs. U. S., 7 Wall. 688.

But we insist that there is no conflict and that the clause concerning general average is no part of the contract of carriage, but upon an entirely different subject, and that the other clauses of the Bill of Lading quoted on pages 6 and 7, relate wholly to damages growing out of a breach of the contract of carriage by the appellant, such as loss by negligence, &c., and that therefore the two subjects being entirely separate, the liability of the ship to contribute in general average in case of a sacrifice, is in no manner affected by its liability to, or exemption from, losses caused by negligence or otherwise. And while appellant has learnedly exhausted the authorities in any manner bearing on the subject, we submit that they do not sustain the position taken.

Much argument is consumed in an effort to demonstrate that the right to general average is a matter of contract and not a right given by the maritime law; but whether this point has been demonstrated or not by appellant, we say is wholly immaterial, for if it is given by the maritime law as decided by the case of *Anderson vs. Ocean Steamship Co.*, 10 App. Cas. 107, (cited by appellant, pp. 10-11 of brief) and as universally held by the courts of the United States.

(The Irrawaddy 171 U. S. 187), the appellant is entitled to its benefits and subject to its burdens, as are all other interests in the adventure; but if it can only arise from contract, then we say the contract (Bill of Lading clause "a" quoted on page 4 of appellant's brief) in this case, has provided for it.

Appellant places great reliance upon the case of the Carron Park, 15 Prob. Div. 300, as supporting its position that general average is purely a matter of contract and says that case has ever since been the law of England. This may be true, and still it is not the law in the United States, for the Supreme Court expressly refused to follow it in the case of The Irrawaddy 171 U. S. 187. In the ~~Crown~~ arrow Park case it was held that as the shipowner was by contract exempt from liability for negligence, he was entitled to contribution in general average; but in The Irrawaddy case the Supreme Court held that as the ship owner was exempt from liability for negligence by statute, he was *not* entitled to contribution in general average.

Appellant has not cited a case, and we believe no case can be found which holds that the terms of a Bill of Lading, such as those quoted by appellant on page 6 of its brief, have anything to do with general average.

On the contrary, all the cases hold that those, or similar clauses, concern solely the contract of carriage and liabilities arising from its breach.

Phoenix Ins. Co. vs. E. & W. Trans. Co., 117 U. S. 312

The Roanoke, 59 Fed. Rep. 161.

S. C., 53 Fed. Rep. 270.

S. C., 46 Fed. Rep. 297.

Therefore the clauses quoted that no lien shall attach to the vessel, and that in case of loss the claim shall be restricted to the value at the port of shipment, have nothing to do with general average, and have no possible bearing on this case.

Appellant makes an ingenious argument to show that the provisions of clause "c" of the Bill of Lading, for the settlement of claims arising from a breach of the contract of affreightment, because the word "adjusted" is used, refers to adjustments in general average. No time need be spent in answering this argument.

Appellant next claims the benefit of the insurance which appellee had upon its cargo, under clause "d" of the Bill of Lading.

This claim is disposed of most effectually by the cases of the Roanoke (59 Fed. R. 161) and *Phoenix Ins. Co. vs. E. & W. Trans. Co.* (117 U. S. 312), neither of which have ever been questioned. In the last case the Supreme Court enforced the clause as a part of the contract of carriage, but in effect held that it did not apply to general average, for it affirmed the judgment of the Court below that the ship should contribute in general average.

II.

Appellant next contends that if the San Francisco adjustment is to be the basis of appellee's right to recover, then the ship should only contribute its proportion, presumably after deducting the value of the entire cargo, and quotes from the libel that there were no courts or facilities at Nome for an adjustment in general average,

and says it was impracticable for the ship to detain the cargo or bring it back to the port of shipment.

Now, there is nothing in the record to sustain this statement. It was not necessary for the ship to detain the cargo on board, for it had a warehouse at Nome and it could have landed the cargo and still retained its lien for general average contribution, or it could have made a qualified delivery and still retained its lien.

Wellman vs. Morse, 76 Fed. Rep. 573,

and there would have been nothing ruinous in this, as appellant asserts.

Appellant says the evidence is undisputed that an average bond was impracticable.

There is nothing in the evidence to support this statement. On the contrary the evidence shows that the cargo was valuable, and it is to be presumed that the owners of it could have furnished any reasonable security for the payment of their contributions, if any such had been demanded, but the evidence shows that none was demanded.

In the absence of any evidence of an attempt on the part of the ship owner or master to obtain average bonds or agreements, it cannot reasonably be assumed that none would have been furnished.

If none could have been obtained it was easy to prove that fact, yet no effort was made to prove it.

Therefore the rule is well settled that the ship is responsible for the contributory share of all cargo, which it delivered without making an effort to obtain security.

Crooks vs. Allen, 5 Q. B. Div. (1879) 38.

1 *Pars. Mar. Law*, 330.

Heye vs. North German Lloyd, 33 Fed. Rep. 60.

The Alliance, 64 Fed. Rep. 871.

But we submit that this discussion is unnecessary, for the ship was not held to contribute for the balance of the cargo so unconditionally delivered, but only upon the value of the ship and freight, and the adjustment sought here is only upon the ship and freight and the cargo appellee.

III.

Appellant next attacks the San Francisco adjustment and cries "fraud," and to support this cry says that appellee submitted affidavits to the adjuster showing its loss and that two years after it submitted other affidavits increasing its loss nearly $20,000. It is perhaps sufficient answer to this to say that the assertion is not borne out by the record; that no such affidavits were introduced in evidence in the Court below and nothing to show that they were produced before the adjuster, except the questions put to La Boyteaux (Rec. pp. 113-115). So it seems to appellee that appellant has set up a mere man of straw for the purpose of having the amusing exercise of knocking it down again.

But whatever proofs may have been submitted to the adjuster in San Francisco, we maintain are now wholly immaterial. Appellee is not trying to sustain that adjustment. It understood the District Court to hold it of no avail, and appellee then proceeded to produce the evidence upon which that Court could, and this can, make a fair and impartial adjustment.

But even if such affidavits as appellant mentions had

been submitted to the adjuster, or introduced in evidence, any conflict in them would only go to the credibility of the particular witness. It would be no evidence of fraud on the part of appellee.

IV.

Appellant says that a large portion of the goods that were allowed to participate in general average were injured by fire and smoke. As to this we assert that it does not clearly appear from Mr. La Boyteaux's evidence just what portion of the cargo was included in his adjustment, nor how much of it, if any, was injured by fire and smoke. But in the trial in the District Court every article that had "been on fire" as prescribed in the York-Antwerp Rules, No. 3, was pointed out in the evidence by appellee and the Court asked to lay those out of the case.

But appellant, although now vehemently claiming that a large part of the cargo was damaged by fire, sedulously refrained from introducing any evidence to sustain that position in the Court below. It did not call as a witness the captain of the vessel, nor a single member of the crew who must have seen and handled each article of cargo as it was discharged from the ship. It did not call a single lighterman, or longshoreman, or warehouseman who also saw and handled each article of the cargo. Although it had Judge Wood on the stand, it asked him but one question on the subject, (Rec. p. 769). It took the deposition of Gollin, a man who testified that he had been for 25½ years manager of a Marine Insurance company, and had much experience in adjusting such losses, and who was employed at a salary of $50 per day to examine and survey and appraise the damage on this cargo, and who, if he made a thorough, conscientious examina-

tion of the cargo, from his long experience in such matters, was the best qualified to determine what particular goods were injured by fire and what by water or steam, for if he had the long experience he says he had, he knew the importance of seggregating the articles which had "been on fire" from those damaged by water or steam, yet, appellant asked him but *two questions* on the subject.

By Mr. Frank: "Q. Now, Mr. Gollin, was there any portion of the Standard Theater Company's goods showed scorching or other effects of fire?" "A. There was a great deal of damage done by steam."

"Q. Outside of steam?"

A. There were signs of scorching there." (Rec. p. 164).

And there appellant and its witness leave the subject, and never return to it.

Now, as the pleadings were amended in this case in the Court below, after that Court had laid aside the San Francisco adjustment, they made a case for an original adjustment in general average by the Court, and that was not an adversary proceeding, in the ordinary sense of that term, but was more in the nature of an amicable equitable proceeding to ascertain the exact truth, let the damage fall where it might. The final determination might have been a judgment against appellee although it initiated the proceeding, just as the final result of the San Francisco adjustment was a finding against appellant, although appellant inaugurated that proceeding and selected its own adjuster without consulting any other interests; and we say that in such an equitable proceeding it is the duty of all concerned to produce the facts, and all of the facts, to the Court, and that where the record

shows, as this record does, that one party could have produced evidence showing just what the true facts were, and yet did not, such party will not be heard to say that all the facts were not proven.

And in this case, the record shows that appellant had it in its power by its witnesses Wood and Gollin and by the master and crew of the ship who handled the cargo, to show each article which "had been on fire," but that it did not see fit to examine them on that subject. It ought not now to be heard to say that the articles which "had been on fire" were not seggregated from those injured by water and steam.

Contrasted with the conduct of appellant, appellee shows by its witnesses all that was humanly possible to show, concerning the articles which "had been on fire," and pointed them out in its brief in the Court below as it has pointed them out in its original brief here, with reference to pages of the record, and from this the Court can separate the items subject to "particular average" from those subject to "general average," and adjust the rights of the parties as nearly right and fair as it is possible under the circumstances, and when this is done appellee will be satisfied.

Appellant in its brief points out some of the articles which had been on fire, but appellee points out more, and a comparison of these with the exhibits will show that their value is small in proportion to the value of the entire cargo of appellee.

It has not been practicable for appellee, in the preparation of its brief, to calculate and state the exact value of the articles which had been on fire, since this appeal was taken for the reason that all of the original exhibits,

invoices, &c., containing the necessary data, had been sent to this Court with the Apostles and they were not available to appellee for use in making a comparison and calculation to ascertain and separately state such value.

But, as said above, there is enough in the record to enable this Court to make the seggregation, and also to make and decree a fair adjustment in this matter.

It will be remembered that the evidence shows that when appellee caused an examination of its cargo to be made at Nome, it was made, not for the purpose of a general average adjustment, but for the purpose of making its proof of loss to the insurance companies, and it thought all damage suffered by its cargo was covered by its policies, whether done by fire, or by water and steam used to extinguish the fire, and when the testimony was taken in the court below a long time had elapsed since the disaster and it was practically impossible for witnesses unskilled in such matters to remember each particular article which had been on fire, but they stated it according to their best recollection. We submit that this is all that is required, for the law will not insist upon an impossibility.

Respectfully submitted,

WM. H. BRINKER,

Proctor for Appellee.